STATE OF MARYLAND	*	**IN THE**
v.	FILED	**CIRCUIT COURT**
MICHAEL JOHNSON	* FEB 25 2013	**FOR**
Defendant	* CIRCUIT COURT FOR BALTIMORE CITY	**BALTIMORE CITY**
		CASE NO.: 112116013

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MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR NEW TRIAL

"That a new trial may be granted in a criminal case tried to a jury is undoubted." In re Petition for Writ of Prohibition, 312 Md. 280, 308 (1988) (disapproval recognized on other grounds, State v. Manck, 385 Md. 581 (2005)). Maryland Rule 4-331 provides, in relevant part, "[o]n motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial. Md. Rule 4-331(a). Additionally, "[t]he court has revisory power and control over the judgment to set aside an unjust or improper verdict and grant a new trial ... in the circuit courts, on motion filed within 90 days after its imposition of sentence." Md. Rule 4-331(b). The Rule further provides that, "[t]he court may hold a hearing on any motion filed under this Rule," and "may revise a judgment or set aside a verdict prior to entry of a judgment only on the record in open court ... [t]he court shall state its reasons for setting aside a judgment or verdict and granting a new trial." Md. Rule 4-331(e).

The Maryland legislature has further provided that a hearing on a motion for new trial shall be heard within 10 days of the filing of the motion unless (1) an agreed statement of the evidence is filed, (2) by written agreement of the parties, or (3) an order is signed by the trial judge. MD. CODE ANN. CRIM. PROC. § 6-105. Section 6-105 is discretionary, not mandatory. Garland v. Director of Patuxent Institution, 224 Md. 653 (1961).

The primary reasons for granting a new trial are "that the ***verdict was contrary to the evidence***; newly-discovered evidence; accident and surprise; misconduct of jurors or the officer having them in charge; bias and disqualification of jurors; misconduct or error of the judge; ***fraud or misconduct of the prosecution.***" MD. CODE ANN. CRIM. PROC. § 6-105, notes section. Gray v. State, 158 Md. App. 635, 646 n.3 (2004).

The "interests of justice" standard for granting a new trial is extremely broad. Folk v. State, 142 Md. App. 590, 603 (2002). "The court's discretion in ruling on such a motion is broad, and the bases on which a criminal defendant may seek to have the court exercise its wide discretion are not limited," and "virtually open-ended." Folk, 142 Md. App. at 603 (citing Love v. State, 95 Md. App. 420, 427, cert. denied, 331 Md. 480 (1993)). "A trial court has wide latitude in considering a motion for a new trial and may consider many factors, including the weighing of evidence and the credibility of the witnesses." Ruth v. State, 133 Md. App. 358, 365 (2000), cert. denied 361 Md. 435 (2000) (citing Argyrou v. State, 349 Md. 587, 599-600 (1998)). The Ruth Court, in quoting Argyrou, stated:

> [T]he breadth of the trial court's discretion to grant or deny a new trial is not fixed or immutable; it will expand and contract depending upon the nature of the factors being considered, and the extent to which its exercise depends upon the opportunity the trial judge had to feel the pulse of the trial, and to rely on his or her own impression in determining the questions of fairness and justice.

138 Md. App. at 365-66 (quoting Argyrou, 349 Md. at 600).

Prosecutorial Vouching for Credibility

In the case at bar, several improper actions were taken by the State prior to and during the trial. First and foremost, the prosecutor made numerous improper and prejudicial statements in her rebuttal closing argument. The State committed misconduct by arguing facts that were not entered into evidence during the trial in order to bolster their main witness's credibility. The

State argued that Mr. James McCray, the sole witness of the Defendant's alleged involvement in the crime, testified to facts that were not released to the media and thus must have come from firsthand knowledge. The prosecutor specifically said, "Mr. McCray knew things that weren't released to the press."At this point the prosecutor was arguing alleged facts that were never presented into evidence. At no time during their case in chief did the State ever offer into evidence information about what was and was not released to the press during the investigation.

The State continued her argument by telling jurors "there was never a release to the press that near this apartment is a Chinese restaurant" and "it was never released to the press that the Defendant called Phylicia, little sis." (See Exhibit One- Transcript of State's Closing Argument p 49 line 13-19.).The Defense objected and the Court sustained the objection, struck the remarks from the record and gave the following curative instruction: "Please disregard the last statement. You must make your decision based on the evidence that's produced." (See Exhibit One- p 50 line 1-3). This line of argument was so important to the State since they wanted to show that McCray had facts that were not known to the public and thereby bolstering his credibility with the jury due to Mr. McCray already having the wrong date and the wrong location of the alleged murder. The State continued to work to bolster their witness by telling the jury that there was no way the witness would have known that Defendant was moving and had a container he could put the body in. Ms. Lapolla specifically said "he [McCray] also said the Defendant told him, that's all right, I'm moving; I've got a container I can put her in." (Exhibit One p. 50 line 10-12). However, at this point the State was making up testimony to bolster their witness by making facts that were never given by Mr. McCray. Mr. McCray actually testified that, "He told me he would move her and he had containers. So, if he could find a big enough one to put her in, you know that's the best way to do it." (See Exhibit Two-Transcript of Mr. James McCray's

Testimony, p. 31 line 1-3) **Mr. McCray never testified that the Defendant told him he was moving or that he had a container big enough to put her in**. While this may seem as if the State has it's facts confused a closer analysis shows that the State has once again mislead the jury with facts not in evidence by using the word "moved" to bolster their witness in the eyes of the jury in making it seem as if Mr. McCray had knowledge that Mr. Johnson was moving when in fact it is clear from Mr. McCray never testified to this fact and would not be privileged to information that only Mr. Johnson could have given to him. The arguing of facts that were not introduced into evidence appears to have been a consistent pattern employed by the State despite the objections from the defense, one of which was sustained; the State on three separate occasions was able to argue "facts"[1] that were not introduced into evidence in an attempt to bolster the credibility of their sole eyewitness.

In Sivells v. State,196 Md. App. 254 (2010) the Court of Special Appeals held that the prosecutor's vouching for the credibility of witnesses during their closing statement constituted reversible error. In Sivells, the State in closing argued that her two key witnesses were being truthful in their testimony and specifically stated that they were "two veterans who have a lot to lose by making things up, pensions, credibility, and livelihood." The court found that there was no evidence to support the prosecutors' statement that the police would lose their pensions or their livelihood and thus the argument was improper. Similarly, the prosecutor in Mr. Johnson's case made statements that had no evidence to support them, thereby making the argument improper. By stating that there was absolutely no other way the witness could have found the information to which he testified, the State was merely offering her opinion that there was no other way for the witness to know the information and her "comments were not tied to the

[1] The so called "facts" argued by the State that were not introduced into evidence are in fact not facts and false statements as the information testified to by the witness was all released in several news reports following the Defendant's arrest. This argument will be addressed.

evidence in the case." Id. As was the case in Sivells,the comments violated the rule against vouching and were improper.

It is abundantly clear that the prosecutor's comments were improper and since the witness whose credibility she was seeking to vouch for was the sole witness linking Mr. Johnson to the murder, it is obvious that the jury was misled and improperly influenced to believe his testimony and this extremely prejudiced the Defendant. Reversal of a verdict is "required where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." Id at 288."In determining whether an error prejudiced the defendant, that is, whether the error was harmless, 'the determinative factor ... has been whether or not the [error], in relation to the totality of the evidence, played a significant role in influencing the rendition of the verdict, to the prejudice of the [defendant]." Degren v. State 352 Md. 400 (1999). To decide whether the improper statements constitute reversible error the court may consider various factors including "the severity of the remarks cumulatively, the weight of the evidence against the accused and the measures taken to cure any potential prejudice." Id. 289.

A major factor in assessing the prejudicial effect of the improper statements is the strength of the State's case against the defendant. In Selvills, in which the Court found that the improper statements did prejudice the defendant, the State's case primarily involved the testimony of the two witnesses which the State attempted to vouch for. Those witnesses were the only two to testify regarding the observation of the criminal act. The State offered no confession, no fingerprints or photographs nor any other circumstantial evidence to corroborate the witnesses' testimony regarding their observations. Similarly, in the Defendant Johnson's case, without the testimony of the State's witness, Mr. McCray, there is absolutely no other

evidence or facts linking Mr. Johnson to the murder of the victim. The State provided no DNA, no fingerprints, no confession and no positive cause of death that could corroborate Mr. McCray's testimony. In fact, the circumstantial evidence provided by the State to corroborate his testimony in fact does the exact opposite. Mr. McCray testified that he told the Defendant not to use anything from the house; however, it is the State's sole argument that the Defendant in fact used a storage container that came from the house. Mr. McCray testified that he told the Defendant to turn off his phone when he was going to move the body; however, the state argues that they were able to track his phone to his brother's house and to Patapsco Park, the two places they believe he may have originally attempted to hide the body. The evidence provided by the State is merely circumstantial and proves nothing more than that the Defendant was the last person to see the victim alive and was moving something out of the apartment that day. There was no connection whatsoever to the actual act of killing the victim, therefore this factor weighs heavily against finding that the prosecutor's comments did not influence the verdict.

The court must also consider the nature of the prosecutor's remarks in assessing whether the improper comment resulted in prejudice against the Defendant. The State in their closing argument did not simply make one isolated comment; she in fact made several improper comments in an attempt to bolster the credibility of her witness and the comments played a crucial role in her rebuttal argument. Clearly, the prosecutors repeated comments appealed to the jury that the witness must have obtained the information through firsthand knowledge. This was extremely improper, and resulted in prejudice against the Defendant and this factor weighs heavily towards reversing the Defendant's conviction.

The final factor to consider is whether the trial court gave any curative instructions regarding the improper statements and whether they sufficiently diminished any undue prejudice

to the Defendant. After the first improper comment made by the prosecutor, the defense objected and the Court sustained it, instructing the jury to "please disregard the last statement. You must make your decision based on the evidence that's produced."(Exhibit One p.50 line 1-2).In addition, the Court initially instructed the jury with the pattern jury instruction regarding the credibility of witnesses. In Silvells, following the State's improper comment, "the trial judge instructed the jurors that the prosecutor's opinion was "not evidence in this case," stating that the prosecutor was merely "permitted to draw an inference as to how you should think rather than how she thinks." When the State continued her argument bolstering her witnesses' credibility, the Court again instructed the jury "Again, the State is sounding like its [sic] expressing its own opinion, which its [sic] not permitted to do. Please accept that as an invitation to draw an inference."Id.291. Additionally, the Court gave an initial jury instruction prior to closing regarding how the jury should determine whether a witness should be believed. The Court of Special Appeals held in Sivells that the instructions given by Court were not sufficient to cure the potential prejudice from the improper vouching and was not able to conclude beyond a reasonable doubt that the comments did not influence the jury to the defendant's prejudice. Id. at 292-293. The instructions given by the Court in Defendant Johnson's case were less explicit then those given in Sivells and thus as in Sivells could not have sufficiently cured the potential prejudice from the improper comments made by the State. Therefore, the Court must reverse the Defendant's conviction and grant him a new trial due to the improper remarks made by the State in her rebuttal argument.

In this case the State's misconduct was even more prejudicial then the previous cases cited because the "facts" argued by the prosecutor that were not entered in to evidence were actually false statements. The State said, "It was never released to the press that the Defendant

called Phylicia'little sis'." Contradictory to the State's argument, in numerous news articles and news stations following the defendant's bail review, the fact that the Defendant considered Phylicia his little sister was specifically mentioned. (See Exhibit 3-4). In addition, the State argues that McCray testified that the Defendant told him he was moving and he had a container and "how would he know that if he wasn't there and hadn't had this conversation with him." However, the Baltimore Sun reportedon April 27, 2012 specific information regarding the allegation that theDefendant "was seen by a neighbor sweating and struggling to move a container from the apartment" and that the prosecutors alleged that the Defendant "moved her body using a 35-gallon plastic tub." Further, the article reports that "Johnson was already moving out of the apartment." (See Exhibit 3). This article was reported just days after the State's own press release regarding the case so it is clear that the State knew that this information was released to the press. Another article that was broadcast ton ABC2 News on April 27, 2012 stated that reporters learned "about a storage container they say Johnson bought at Wal-Mart and had difficulty carrying out of the Northwest Baltimore apartment where Phylicia was visiting family." The same broadcast stated that "relatives have said Johnson thought of her [Phlyicia] as a little sister." (See Exhibit 4). It is clear from the numerous articles and television broadcasts that the details to which Mr. McCray testified to were in fact released to the media. The State knewthis fact and therefore was untruthful and purposely misled the jury with false information. Additionally, it turns out that Mr. McCray was incarcerated in the Baltimore County Detention Center, not the Charles County Detention Center (as the State led the jury to believe) during the month of April 2012. According to the warden has televisions which show the local news stations which would have broadcast the above referenced stories. (See Exhibit 5).[2](Letter from

[2] The information that Mr. McCray was incarcerated in Baltimore County Detention Center at the time the press released the information about the Defendant's arrest was unknown to defense counsel during the trial and the

the Warden of Baltimore County Detention Center verifying this information will be made available during a hearing in this matter).

The Prosecutor Used Defendant's Silence Against Him Improperly Shifting the Burden of Proof to the Defendant

The State continued her misconduct and improper comments as she finished her rebuttal argument by improperly attempting to use the Defendant's silence against him. The State argued "he [Mr. Johnson] offers no explanation for why his phone was hitting off the towers in Patapsco State Park. He [Mr. Johnson] offers no explanation about why his phone was turned off." (See exhibit 1, page 53, line 6-9) The Defense immediately objected to the State's remarks and was properly sustained by the court, however no curative instruction was given following this remark and the State continued the argument stating that "in his two statements to police, he never once mentioned why there's absolutely no signal for a two hour time frame." The State clearly disregarded the court's ruling and continued to appeal to the jury that the Defendant did not give information to the police thereby using his silence against him. This tactic not only violated the Defendant's absolute right not to have his silence held against him but additionally shifted the burden of production to the Defense.

The State has the burden to prove the Defendant is guilty beyond a reasonable doubt and any attempt to shift that burden to the defendant to prove his innocence denies him the right to a fair trial. The State, by arguing that the Defendant offered no explanations for his alleged actions, effectually shifted the burden to the Defendant by pointing out to the jury that the Defendant had not attempted to prove his innocence. The Court, although sustaining the defense's objection, provided no curative instructions to the jury following this comment and allowed the jury to be misled. In Booze v. State, 111 Md. App. 208 (1996), the Court of Special

State's failure to give that information in discovery is addressed later on in this memorandum.

Appeals held that the reversal was not warranted because a curative instruction eliminated any reasonable possibility that they jury was either misled or prejudiced by the comments. In Booze the prosecutor told the jury in her closing argument that "no one has come forward and said that this didn't happen" the defense counsel strenuously objected to the comment and requested a mistrial. The judge denied the request for mistrial and instead gave an extremely detailed instruction reminding the jurors that the Defendant had "absolutely no burden of proof,[3]" starkly different than the case for the Defendant in which no curative instruction was given whatsoever thereby clearly misleading the jury and warranting the verdict be set aside and a new trial be granted.

Rule 4-263 and Brady Violations

In addition to the misconduct committed during the trial the State prior to trial committed a serious discovery violation by failing to provide key information regarding their star witness. The State failed to disclose that their sole eye witness, Mr. James McCray, was in fact incarcerated in Baltimore County and not Charles County when the news of the Defendant's arrest was made public. In addition, they failed to notify the defense that on August 2, 2012, the day following his interview by Maryland State Troopers regarding the Defendant's case, the witness's pending charges of unlawful taking of a motor vehicle, unauthorized removal of property, theft $10,000-$100,000, false statement to a peace officer, and removal of a serial

[3] The full jury instruction given by the court was as follows: "Members of the jury, the State sort of, not quite, implied that there might be some responsibility for the defendant to bring evidence in, or what have you. The defendant, and I've told you this at least a half dozen times, has absolutely no burden of proof, and to the extent that that was an implication, then that was wrong and [the State] won't do that again. I don't think [the State] meant to do that. It may have been misspoken on [the State's] part.

But, remember this, these defendants have no burden of proof whatsoever, and that's from the beginning of the trial to the end of the trial. The burden of proof is on the State to prove the defendants guilty beyond a reasonable doubt if the State can." Booze v. State 111 Md. App. 208 (1996).

number in Baltimore County were entered Nolle Prosequi for no recorded reason. (See Exhibit 6 to include copy of Mr. McCrays statement of Facts in said case).

The Supreme Court has held that the Government may not suppress any evidence that the defense requests that may be favorable to its case. Brady v. Maryland, 373 U.S. 83, 87 (1963). Failure to disclose evidence that is material either to guilt or punishment violates due process, regardless of whether or not it was done in good faith of the prosecution. Id. This discovery obligation applies to both exculpatory evidence as well as impeachment evidence. State v. Williams, 392 Md. 194, 197 (2006). When the Government fails to disclose evidence that weighs in on the credibility of a Government witness, a new trial is proper assuming that the evidence is material enough to have affected the judgment of the jury. Giglio v. United States, 405 U.S. 150, 154 (1972). There are three elements to a Brady violation: (1) the evidence must be favorable to accused (exculpatory or impeaching), (2) that it must have been suppressed by the State, and (3) prejudice ensued. Williams, 392 Md. at 199. In U.S. v. Agurs,427 U.S. 97 (1976), the Supreme Court held that in cases in which "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury... ...a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is ***any reasonable likelihood*** that the false testimony could have affected the judgment of the jury. Id. at 103-14

In State v. Williams, a paid informant who was a jail-house snitch testified that he was receiving nothing for testifying and was testifying to be a good Samaritan. However, unbeknownst to the individual prosecutor and homicide detective in that case, he was a paid informant of the Baltimore City Police Department and assisted the police and prosecutor's

office with many prosecutions. Both the Court of Special Appeals and Court of Appeals recognized that,

> When, as here, there is an obvious basis to suspect the motives and credibility of a proposed witness for the State, it may be incumbent upon the State's Attorney, in an office with many Assistant State's Attorneys, to establish a procedure to facilitate compliance with the obligation under Brady to disclose to defense material that includes information casting a shadow on a government witness's credibility.

Williams, 392 Md. at 205 (internal citations omitted) (internal quotations omitted). The Court of Appeals went on to recognize that,

> Brady violations cover a variety of prosecutorial transgressions involving the breach of the duty to disclose exculpatory evidence ... these transgressions include both the failure to search for, and the failure to produce, such evidence ... when the core of the State's argument relies on the testimony of an essential witness, the State has a duty to discover anything, and everything, that concerns that witness's credibility and, thus, potential for impeachment.

Id. at 210-11.

In Defendant Johnson's case before this Honorable Court, the State failed to produce information regarding exactly where the witness was incarcerated during the time that information regarding the Defendant's arrest was released to the media. The State in their case-in-chief argued that the witness was credible because he could not have found out the information for which he testified through any other means than personal knowledge. The State opined that the witness was incarcerated at the time of his testimony in the Charles County Detention Center. The State further admitted that the witness had been incarcerated in Charles County at other times by entering his incarceration records during his testimony.(State's Exhibit 69 from the trial). By entering this information the State allowed the jury to infer that the witness was incarcerated in the Charles County when the news was released regarding the Defendant and therefore that he would not have been able to have access to the information.

However, the State failed to mention that the witness was in fact incarcerated in Baltimore County Detention Center in April of 2012 when news of the Defendant's arrest was covered on the local Baltimore news stations. The State disingenuously led the defense and eventually the jury to believe that their star witness was located in the Charles County Detention Center during April of 2012 and thus would not have had access to Baltimore television stations and would not have been able to receive news of the Defendant's arrest. The State produced in discovery two documents regarding the witness's criminal history. One document was a criminal history report that addressed his previous arrests outside of the state of Maryland. (See Exhibit 7). The second document that was produced was a typed report giving only the witness's actual conviction. (See Exhibit 8). From the defenses review of the 30,000 pages of discovery there was no document that was given regarding the witness's arrest history. Specifically, this information was not included with all of Mr. McCray's other information and by failing to provide the arrest report, the State in effect prevented the defense from finding out that the witness was incarcerated in Baltimore County during the press releases regarding the Defendant. This in turn, prevented the defense from being able to use that information to properly impeach and cross-examine the witness. The evidence of the witness's incarceration in the Baltimore County Detention Center which was favorable to the Defendant for impeachment purposes was suppressed by the State and caused prejudice to ensued, thus satisfying the requirements for a Brady violation.

Additionally, the State failed to disclose to the defense that the witness had pending felony charges in Baltimore County that were mysteriously dismissed the day after he gave an interview to Maryland State Troopers regarding the Defendant's case. The State strenuously argued throughout their case that Mr. McCray did not receive anything in exchange for his testimony and as was alleged in the Williams case was "testifying to be a Good Samaritan."

However, evidence that Mr. McCray had seven charges dismissed against him by the neighboring jurisdiction's State's Attorney's Office the day after he spoke with officers regarding Defendant's case would clearly have been useful in rebutting the State's argument that he did not in fact receive anything. These obvious violations of discovery were so deliberate as to exclude the defense from properly impeaching the only eyewitness.

The State may argue that, because a great deal of the information that they suppressed was available on Maryland's Case Search database, there can be no discovery violation and that most, if not all, of the information in the criminal history can also be found in some public records. However, this reasoning would have one believe that there is an exception to the discovery rules but in fact there is no thing as a "public information" exception to the Brady requirement." Chavis v. North Carolina, 637 F.2d 213, 225 (4th Cir. 1980).

The courts in Maryland have addressed this issue in Ware v. State, 348 Md. 19, (1997), the prosecution failed to disclose the fact that one of its witnesses had a motion for reconsideration of his sentence pending at the time of his testimony. Although the information within the motion was "public information," the Court of Special Appeals held that the State was required to disclose it:

> Merely because evidence is available through public records, however, does not necessarily mean that it is available to the accused for purposes of determining whether the *Brady* rule applies. As the United States Court of Appeals for the Fourth Circuit has noted, "there is no general 'public records' exception to the *Brady* rule." Chavis v. North Carolina, 637 F.2d 213, 225 (4th Cir. 1980). Even when the exculpatory information can be found in public records, the necessary inquiry is whether the defendant knew or should have known facts that would have allowed him to access the undisclosed evidence. Payne, 63 F.3d at 1208. Furthermore, the existence of evidence in the public record does not suffice to relieve the State of its duty to disclose material, favorable evidence to the defense unless a reasonable defendant would have looked to that public record in the exercise of due diligence. Kelly, 35 F.3d at 937. (holding that exculpatory evidence not reasonably available as a public record when the document was not filed until the day on which the defense rested its case).

> The case of United States v. Payne, 63 F.3d at 1205, is factually similar to the instant case. In *Payne,* the government did not disclose to the defense an affidavit of a State's witness, Wilkerson, who had pled guilty to narcotics charges arising out of the same activity for which Payne was indicted. In an affidavit, submitted to the trial court prior to her guilty plea, Wilkerson stated under oath that she "never entered into any conspiracy to sell or possess narcotics with anyone" and that she had "never sold any narcotics." Id. Wilkerson subsequently pled guilty to distribution and possession with intent to distribute crack and possession of firearms in connection with drug trafficking. Id. At Payne's trial, she testified that Payne had lured her into the drug trade and that she was only selling drugs to put herself through school. Id. at 1206. The defense was not aware of Wilkerson's prior statement under oath that she had never sold drugs. The government in *Payne* contended that it had no duty to disclose the Wilkerson affidavit because it was in public court records to which Payne had access. The Second Circuit rejected this contention. Noting the established rule that "documents that are part of the public records are not deemed suppressed if defense counsel should know of them and fails to obtain them because of lack of diligence in his own investigation," *id.*at 1208, the Second Circuit concluded that Payne had no reason to believe that Wilkerson had filed an affidavit nor did he have any indication of facts that would have required him to discover the affidavit. Id. at 1209. Accordingly, the court held that "the government had suppressed the Wilkerson affidavit within the meaning of *Brady.*" Id.

Ware, 348 Md. at 39-40.

The State cannot rely upon the fact that Mr. McCray's arrest and dismissed charges in Baltimore County could be found within the public records of Maryland, since this does not relieve the State of its responsibility to turn over evidence that could be used to impeach Mr. McCray's testimony. The State's actions prevented Mr. Johnson's counsel from even raising the issue or permitting this Honorable Court to conduct a hearing on the matter to properly admit or exclude such evidence. It is for these reasons that Defendant Johnson should be granted a new trial.

The Failure of the State to Provide the Defense with Detective Bennett's Notes constituted a Discovery Violation

During the trial, one of the State's witnesses, Detective Ray Bennett, testified that he was able to establish that there was a connection between the Defendant and James McCray. During closing argument, the prosecutor stated: "He [McCray] called auto repair places to see where he did business to verify it." (Exhibit 1, at page 28, lines10-11).

However, review of the information provided by the State during discovery did not contain any description of Detective Bennett's actions to verify a connection between the Defendant and McCray. Conspicuously absent were the identities of any witnesses, investigative notes, reports, telephone numbers, and locations visited, that Detective Bennett purportedly relied on to support his testimony at trial that he corroborated the connection between McCray and the Defendant.

In ruling on a motion for a new trial based upon a violation of the rules of discovery, a court must determine whether the violation was material and may have affected the outcome of the jury's verdict. Isley v. State, 129 Md. App. 611 (2000).

Because of this "discovery violation," counsel for the Defendant were denied the opportunity to inspect and review any documents or records relating to the direction, or scope of Detective Bennett's investigation that would have aided counsel during cross-examination of Detective Bennett. Clearly this information was outcome determinative and material to such a degree that it reasonably and foreseeably could have changed the outcome of the Jury's verdict.

Verdict Against the Weight of Evidence

This Honorable Court may grant Defendant Johnson a new trial if it finds that the verdict was against the weight of the evidence, even if this Honorable Court finds that the case was *legally* sufficient to send to the jury. In determining whether a verdict is against the weight of the evidence, this Honorable Court has the ability to weigh evidence and make credibility determinations. In re Petition for Writ of Prohibition, 312 Md. at 326. "To grant or deny a motion for new trial on the basis that a verdict is against the weight of the evidence is, of course, a discretionary matter." Id. at 327. The Court of Appeals has previously stated,

> [T]here is a difference between a motion for judgment of acquittal and a motion for new trial based on weight of the evidence. The former, if granted results in acquittal and the proper test is sufficiency of the evidence to convict. Weight and credibility are not at issue. The evidence must be read from the viewpoint most favorable to the prosecution and if so read any rational fact-finder would find it sufficient, the motion must be denied. The latter, if granted, results only in a new trial. As a consequence, a court has more latitude in considering it, and may take into account facts such as credibility.

Id. at 325. The Court of Appeals has further stated that the granting of a new trial on the basis of weight of the evidence should be reserved for those cases where the granting of a new trial was necessary to avoid a miscarriage of justice. Id. at 327. The Court of Appeals explained,

> a trial judge is not at liberty to set aside a verdict of guilt and to grant a new trial merely because the judge would have reached a result different from that of the jury's ... [m]otions for new trial on the ground of weight of the evidence are not favored and should be granted only in exceptional cases, when the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to let the verdict stand.

Id. at 326.

In Defendant Johnson's case, the only evidence presented constituted a collaborative guess by multiple witnesses that the Defendant was involved in the murder of Phylicia Barnes. In other words, the prosecution created a "string" of dependent factors which, if all were

believed to be credible, constituted the "best guess" of who committed the crime in this case. Theonly actual connection between the Defendant and the killing itself was one witness whose credibility falls well below that of which any reasonable person could believe was telling the truth.

Evaluating the weight, credibility, and reliability of the witness testimony in this case leads to the conclusion that a miscarriage of justice has occurred. The conviction of the Defendant in this case is based on a chain of suspect and unreliable variables that depend on one another for any relevance and credibility. Even if each variable was independently admissible under the Maryland Rules of Evidence, the resulting case becomes entirely suspect and unreliable. It is for the above-listed reasons that this Honorable Court would be well within its discretion, after weighing the identification evidence and examining the credibility and reliability of that evidence, to grant a new trial in this matter. This is an exceptional case where the jury did not properly weigh the evidence because the evidence "preponderates heavily against the verdict" and it would be a miscarriage of justice to permit this conviction to stand. The interest of justice standard for granting a new trial implores this Honorable Court to grant Defendant a new trial in this matter.

Conclusion

It is for the above-stated reasons, which each standing alone the court is well within his discretion to grant a motion for new trial, that due to the cumulative effect of all the improper actions detailed in this memorandum that Defendant moves this Honorable Court to hold a hearing on this matter and argument to be made, and after said hearing in the interests of justice grant Defendant a new trial in this matter.

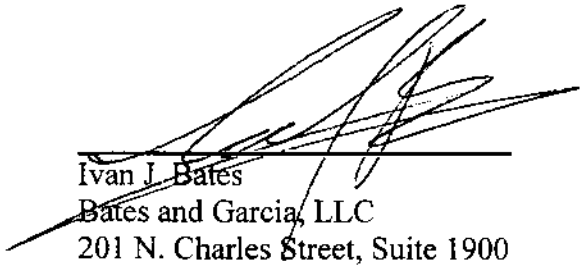
Respectfully submitted,

IVAN J. BATES, ESQUIRE
BATES & GARCIA, LLC
Attorney at Law
201 N. Charles Street, Suite 1900
Baltimore, Maryland 21202
410-814-4600

RUSSELL A. NEVERDON, ESQUIRE
Law Office of Russell Neverdon
Attorney at Law
201 N. Charles Street, Suite 1900
Baltimore, Maryland 21202
410-235-2184

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion to Compel was hand delivered on February 15, 2013 to: Lisa Goldberg, Office of the State's Attorney for Baltimore City, 208 Clarence Mitchell, Jr. Courthouse, 100 N. Calvert Street, Baltimore, Maryland 21202.



Ivan J. Bates
Bates and Garcia, LLC
201 N. Charles Street, Suite 1900
Baltimore, Maryland 21202
(410) 814-4600

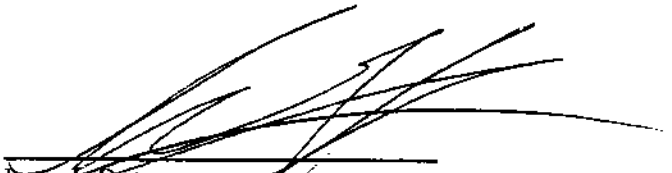
Respectfully submitted,

IVAN J. BATES, ESQUIRE
BATES & GARCIA, LLC
Attorney at Law
201 N. Charles Street, Suite 1900
Baltimore, Maryland 21201
410-814-4600

RUSSELL A. NEVERDON, ESQUIRE
Law Office of Russell Neverdon
Attorney at Law
201 N. Charles Street, Suite 1900
Baltimore, Maryland 21201
410-235-2184

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion to Compel was hand delivered on February 15, 2013 to: Lisa Goldberg, Office of the State's Attorney for Baltimore City, 208 Clarence Mitchell, Jr. Courthouse, 100 N. Calvert Street, Baltimore, Maryland 21202.



Ivan J. Bates
Bates and Garcia, LLC
201 N. Charles Street, Suite 1900
Baltimore, Maryland 21201
(410) 814-4600